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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
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9 Ronnie Wayne Clark, ) CIV-13-1482-PHX-SRB (MHB)  
10 Petitioner, ) **REPORT AND RECOMMENDATION**  
11 vs. )  
12 Charles L. Ryan, et al., )  
13 Respondents. )  
14 \_\_\_\_\_ )

15 TO THE HONORABLE SUSAN R. BOLTON, UNITED STATES DISTRICT COURT:

16 Petitioner Ronnie Wayne Clark, who is confined in the Arizona State  
17 Prison-Kingman, filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §  
18 2254 (Doc. 1). Respondents filed an Answer on June 26, 2014 (Doc. 13), and Petitioner filed  
19 his Reply on September 22, 2014 (Docs. 18, 19).

20 **BACKGROUND<sup>1</sup>**

21 According to the pleadings, this instant habeas petition involves three separate, but  
22 related, cause numbers – CR 2008-006095-015 DT, CR 2008-006592-003 DT, and CR  
23 2009-007738-001 DT.

24 Regarding CR 2008-006095-015 DT, on March 14, 2008, the Maricopa County Grand  
25 Jurors, in a multi-count indictment involving over 40 defendants and over 500 charges,  
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28 <sup>1</sup> Unless otherwise noted, the following facts are derived from the exhibits submitted  
with Doc. 13 – Respondents' Answer.

1 indicted Petitioner for one count of conspiracy, a class 2 felony (Count 1); one count of  
2 illegally conducting an enterprise, a class 3 felony (Count 4); one count of assisting a  
3 criminal street gang, a class 3 felony (Count 6); one count of money laundering, a class 3  
4 felony (Count 7); 26 counts of use of wire communication or electronic communication in  
5 drug related transaction, class 4 felonies (Counts 41, 45, 51, 55, 64, 79, 84, 96, 126, 142, 157,  
6 163, 169, 211, 256, 271, 301, 320, 344, 377, 405, 432, 459, 460, 504, and 541); and 23  
7 counts of sale, transfer or offer to sell or transfer narcotic drugs, class 2 felonies (Counts 44,  
8 50, 54, 63, 78, 95, 125, 141, 156, 162, 168, 210, 255, 270, 301, 319, 343, 376, 404, 431, 458,  
9 503, and 540). (Exh. A.) The offenses were summarized in the presentence report as  
10 follows:

11       During the first part of year 2007, an increase in violent and drug related crime  
12 occurred in the area claimed by the criminal street gang, the Westside City  
13 Crips. An investigation ensued into this gang and their involvement in the  
14 trafficking of narcotic drugs, specifically, crack cocaine. During the  
15 investigation, which included interception of cellular telephone calls and  
surveillance, Ebony Letrice Hickman was identified as being a major supplier  
of crack cocaine to members of the criminal street gang. Through the same  
investigative methods, [Petitioner] was identified as Ebony Hickman's supplier  
of crack cocaine from November 1, 2007, through March 13, 2008.

16 (Exh. O at 1.)

17       As to CR 2008-006592-003 DT, on April 16, 2008, the Maricopa County Grand  
18 Jurors indicted Petitioner on two counts of possession of narcotic drugs for sale, class 2  
19 felonies (Counts 6 and 7). (Exh. B.) As described in the presentence report:

20       During the investigation as to his actions and involvement with Ebony  
21 Hickman, [Petitioner] was found to be a primary supplier of crack cocaine,  
which occurred on a weekly basis.

22       On March 19, 2008, a search warrant was served on his home and property.  
23 Located in a hidden compartment in his vehicle and operated by a power  
switch were three packaged baggies containing 191 grams, 263 grams, and 317  
grams of crack cocaine.

24 (Exh. O at 2.)

25       And, regarding CR 2009-007738-001 DT, on October 8, 2009, the Maricopa County  
26 Grand Jurors indicted Petitioner on seven counts of misconduct involving weapons, class 4  
27 felonies. (Exh. C.) The presentence report stated:  
28

1 On March 19, 2008, a search warrant was served on [Petitioner's] home  
2 resulting from his involvement in illegal narcotic drug sales with Ebony  
3 Hickman and her associates. Located in [Petitioner's] home at the time were  
4 seven firearms.

(Exh. O at 2.)

5 On August 3, 2010, Petitioner entered into plea agreements on all three cause  
6 numbers. In CR 2008-006095-015 DT, Petitioner pled guilty to Count 4, participation in an  
7 illegal enterprise, a class 3 felony; Count 6, assisting a criminal street gang, a class 3 felony,  
8 and Count 7, money laundering, a class 3 felony with one prior felony conviction. (Exh. D  
9 at 1.) In exchange, the State dismissed all remaining charges and sentencing allegations. (Id.  
10 at 2; Exhs. G, J.)

11 In CR 2008-006592-003 DT, Petitioner pled guilty to Counts 6 and 7, possession of  
12 narcotic drugs for sale in an amount that exceeded the statutory threshold, both class 2  
13 felonies with one prior felony conviction. (Exh. E at 1.) The parties stipulated that Petitioner  
14 be sentenced to concurrent aggravated terms of 14 years of imprisonment, to run currently  
15 with sentences imposed in the other two cause numbers. (Id. at 1-2; Exhs. H, J.)

16 In CR 2009-007738-001 DT, Petitioner pled guilty to Counts 1 and 2, misconduct  
17 involving weapons, both class 4 felonies. (Exh. F at 1.) In exchange, the State dismissed  
18 Counts 3 through 7 and the prior felony conviction allegation. (Id.; Exhs. I, J.)

19 On September 9, 2010, the trial court sentenced Petitioner in all three cause numbers  
20 pursuant to the stipulated sentences in the plea agreements. (Exhs. D, E, F.) For CR  
21 2008-006095-015 DT, the trial court sentenced Petitioner to 3.5 years of imprisonment each  
22 for Counts 4 and 6, and to 6.5 years of imprisonment for Count 7, all to be served  
23 concurrently with each other as well as the sentences in the other two cause numbers. (Exh.  
24 K at 2-3; Exh. N at 6.) For CR 2008-006592-003 DT, the court sentenced Petitioner to 14  
25 years of imprisonment each for Counts 6 and 7, also to be served concurrently with each  
26 other as well as the sentences in the other two cause numbers. (Exh. L at 2; Exh. N at 6-7.)  
27 And, for CR 2009-007738-001 DT, the court sentenced Petitioner to 2.5 years of  
28 imprisonment each for Counts 1 and 2, to be served concurrently with each other, as well as

1 with the sentences in the other two cause numbers. (Exh. M at 2; Exh. N at 7.) Petitioner  
2 received and signed a “Notice of Rights of Review after Conviction and Procedure” for all  
3 three cause numbers at his sentencing hearing on September 9, 2010. (Exhs. P, Q, R.)

4 On November 26, 2010, Petitioner filed a timely notice of post-conviction relief in all  
5 three cause numbers. (Exh. S.) The trial court assigned PCR counsel on December 1, 2010.  
6 (Exh. T.) On March 16, 2011, Petitioner’s PCR counsel filed a notice alerting the court that  
7 a review of the record revealed no “tenable” issues to raise in a petition for post-conviction  
8 relief. (Exh. U.) On April 4, 2011, the trial court granted Petitioner time within which to file  
9 a *pro per* petition for post-conviction relief. (Exh. V.)

10 On May 17, 2011, Petitioner filed a *pro per* petition for post-conviction relief, in  
11 which he checked several boxes on the form, alleging generally and without development  
12 that he was eligible for relief because: evidence introduced at trial was obtained by an  
13 unconstitutional search and seizure; he had constitutionally ineffective counsel; his plea was  
14 unlawfully induced; other constitutional rights were abridged; the indictment and information  
15 were invalid; the trial court lacked jurisdiction; and other unspecified general grounds. (Exh.  
16 W at 2.) The State filed a response on August 22, 2011, arguing that Petitioner’s PCR  
17 petition was “too vague and general to allow a response” and that Petitioner did not state a  
18 colorable claim for relief. (Exh. X at 9.) Petitioner filed a reply on September 12, 2011.  
19 (Exh. Y.) On October 6, 2011, the trial court summarily dismissed Petitioner PCR petition  
20 for failing to state a colorable claim for relief. (Exh. Z.)

21 Petitioner evidently filed a petition for review of the trial court’s denial of his PCR  
22 petition although said petition for review has not been submitted by the parties. On May 31,  
23 2012, Petitioner moved to stay the petition for review that, according to the motion to stay,  
24 he had filed on November 10, 2011. (Exh. AA.) The Arizona Court of Appeals denied the  
25 petition for review on May 15, 2013. (Exh. BB.)

26 On June 5, 2012, Petitioner filed a second PCR petition, raising four issues: (1)  
27 wiretap evidence was obtained in violation of his constitutional rights; (2) IAC (trial counsel)  
28 for failure to challenge wiretap evidence; (3) prosecutorial misconduct for failure to file an

indictment within time proscribed by Rule 12.9 of the Arizona Rules of Criminal Procedure; and (4) the trial court lacked jurisdiction. (Exh. CC at 6.) On June 19, 2012, the trial court dismissed the PCR petition as untimely. (Exh. DD at 2.) On July 9, 2012, Petitioner filed a notice of appeal, followed by a petition for review filed on July 18, 2012, in the court of appeals. (Exhs. EE, FF.) On October 3, 2013, the Arizona Court of Appeals denied the petition for review. (Exh. GG.)

On July 22, 2013, Petitioner timely filed the instant habeas petition, alleging four grounds for relief: (1) Petitioner's Fourth, Fifth, Sixth, and Fourteenth Amendment rights were violated when he was denied the opportunity to challenge irregularities in the grand jury proceedings; (2) Petitioner's counsel was ineffective during plea negotiations, in violation of Petitioner's Sixth and Fourteenth Amendment rights; (3) Petitioner's conviction was obtained as a result of prosecutorial misconduct, in violation of Petitioner's Fourth, Fifth, and Fourteenth Amendment rights; and (4) Petitioner's Fourth, Fifth, and Sixth Amendment rights were violated when evidence obtained in an unconstitutional seizure was used to convict him.

### DISCUSSION

In their Answer, Respondents contend that all of the grounds for relief set forth in Petitioner's habeas petition are procedurally defaulted. As such, Respondents request that the Court deny and dismiss Petitioner's habeas petition with prejudice.

A state prisoner must exhaust his remedies in state court before petitioning for a writ of habeas corpus in federal court. See 28 U.S.C. § 2254(b)(1) and (c); Duncan v. Henry, 513 U.S. 364, 365-66 (1995); McQueary v. Blodgett, 924 F.2d 829, 833 (9<sup>th</sup> Cir. 1991). To properly exhaust state remedies, a petitioner must fairly present his claims to the state's highest court in a procedurally appropriate manner. See O'Sullivan v. Boerckel, 526 U.S. 838, 839-46 (1999). In Arizona, a petitioner must fairly present his claims to the Arizona Court of Appeals by properly pursuing them through the state's direct appeal process or through appropriate post-conviction relief. See Swoopes v. Sublett, 196 F.3d 1008, 1010 (9<sup>th</sup> Cir. 1999); Roettgen v. Copeland, 33 F.3d 36, 38 (9<sup>th</sup> Cir. 1994).

1 Proper exhaustion requires a petitioner to have “fairly presented” to the state courts  
 2 the exact federal claim he raises on habeas by describing the operative facts and federal legal  
 3 theory upon which the claim is based. See, e.g., Picard v. Connor, 404 U.S. 270, 275-78  
 4 (1971) (“[W]e have required a state prisoner to present the state courts with the same claim  
 5 he urges upon the federal courts.”). A claim is only “fairly presented” to the state courts  
 6 when a petitioner has “alert[ed] the state courts to the fact that [he] was asserting a claim  
 7 under the United States Constitution.” Shumway v. Payne, 223 F.3d 982, 987 (9<sup>th</sup> Cir. 2000)  
 8 (quotations omitted); see Johnson v. Zenon, 88 F.3d 828, 830 (9<sup>th</sup> Cir. 1996) (“If a petitioner  
 9 fails to alert the state court to the fact that he is raising a federal constitutional claim, his  
 10 federal claim is unexhausted regardless of its similarity to the issues raised in state court.”).

11 A “general appeal to a constitutional guarantee,” such as due process, is insufficient  
 12 to achieve fair presentation. Shumway, 223 F.3d at 987 (quoting Gray v. Netherland, 518  
 13 U.S. 152, 163 (1996)); see Castillo v. McFadden, 399 F.3d 993, 1003 (9<sup>th</sup> Cir. 2005)  
 14 (“Exhaustion demands more than drive-by citation, detached from any articulation of an  
 15 underlying federal legal theory.”). Similarly, a federal claim is not exhausted merely because  
 16 its factual basis was presented to the state courts on state law grounds – a “mere similarity  
 17 between a claim of state and federal error is insufficient to establish exhaustion.” Shumway,  
 18 223 F.3d at 988 (quotations omitted); see Picard, 404 U.S. at 275-77.

19 Even when a claim’s federal basis is “self-evident,” or the claim would have been  
 20 decided on the same considerations under state or federal law, a petitioner must still present  
 21 the federal claim to the state courts explicitly, “either by citing federal law or the decisions  
 22 of federal courts.” Lyons v. Crawford, 232 F.3d 666, 668 (9<sup>th</sup> Cir. 2000) (quotations  
 23 omitted), amended by 247 F.3d 904 (9<sup>th</sup> Cir. 2001); see Baldwin v. Reese, 541 U.S. 27, 32  
 24 (2004) (claim not fairly presented when state court “must read beyond a petition or a brief  
 25 ... that does not alert it to the presence of a federal claim” to discover implicit federal claim).

26 Additionally, under the independent state grounds principle, a federal habeas court  
 27 generally may not review a claim if the state court’s denial of relief rests upon an  
 28

1 independent and adequate state ground. See Coleman v. Thompson, 501 U.S. 722, 731-32  
 2 (1991). The United States Supreme Court has explained:

3 In the habeas context, the application of the independent and adequate state  
 4 ground doctrine is grounded in concerns of comity and federalism. Without  
 5 the rule, a federal district court would be able to do in habeas what this Court  
 6 could not do on direct review; habeas would offer state prisoners whose  
 custody was supported by independent and adequate state grounds an end run  
 around the limits of this Court's jurisdiction and a means to undermine the  
 State's interest in enforcing its laws.

7 Id. at 730-31. A petitioner who fails to follow a state's procedural requirements for  
 8 presenting a valid claim deprives the state court of an opportunity to address the claim in  
 9 much the same manner as a petitioner who fails to exhaust his state remedies. Thus, in order  
 10 to prevent a petitioner from subverting the exhaustion requirement by failing to follow state  
 11 procedures, a claim not presented to the state courts in a procedurally correct manner is  
 12 deemed procedurally defaulted, and is generally barred from habeas relief. See id. at 731-32.

13 Claims may be procedurally barred from federal habeas review based upon a variety  
 14 of factual circumstances. If a state court expressly applied a procedural bar when a petitioner  
 15 attempted to raise the claim in state court, and that state procedural bar is both  
 16 "independent"<sup>2</sup> and "adequate"<sup>3</sup> – review of the merits of the claim by a federal habeas court  
 17 is barred. See Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991) ("When a state-law default  
 18 prevents the state court from reaching the merits of a federal claim, that claim can ordinarily  
 19 not be reviewed in federal court.") (citing Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977)  
 20 and Murray v. Carrier, 477 U.S. 478, 485-492 (1986)).

21 Moreover, if a state court applies a procedural bar, but goes on to alternatively address  
 22 the merits of the federal claim, the claim is still barred from federal review. See Harris v.  
 23 Reed, 489 U.S. 255, 264 n.10 (1989) ("[A] state court need not fear reaching the merits of  
 24 \_\_\_\_\_

25 <sup>2</sup> A state procedural default rule is "independent" if it does not depend upon a federal  
 26 constitutional ruling on the merits. See Stewart v. Smith, 536 U.S. 856, 860 (2002).

27 <sup>3</sup> A state procedural default rule is "adequate" if it is "strictly or regularly followed."  
 28 Johnson v. Mississippi, 486 U.S. 578, 587 (1988) (quoting Hathorn v. Lovorn, 457 U.S. 255,  
 262-53 (1982)).



1 a federal claim in an *alternative* holding. By its very definition, the adequate and  
 2 independent state ground doctrine requires the federal court to honor a state holding that is  
 3 a sufficient basis for the state court's judgment, even when the state court also relies on  
 4 federal law. ... In this way, a state court may reach a federal question without sacrificing its  
 5 interests in finality, federalism, and comity.") (citations omitted); Bennett v. Mueller, 322  
 6 F.3d 573, 580 (9<sup>th</sup> Cir. 2003) ("A state court's application of a procedural rule is not  
 7 undermined where, as here, the state court simultaneously rejects the merits of the claim.")  
 8 (citing Harris, 489 U.S. at 264 n.10).

9 A procedural bar may also be applied to unexhausted claims where state procedural  
 10 rules make a return to state court futile. See Coleman, 501 U.S. at 735 n.1 (claims are barred  
 11 from habeas review when not first raised before state courts and those courts "would now  
 12 find the claims procedurally barred"); Franklin v. Johnson, 290 F.3d 1223, 1230-31 (9<sup>th</sup> Cir.  
 13 2002) ("[T]he procedural default rule barring consideration of a federal claim 'applies only  
 14 when a state court has been presented with the federal claim,' but declined to reach the issue  
 15 for procedural reasons, or 'if it is clear that the state court would hold the claim procedurally  
 16 barred.'") (quoting Harris, 489 U.S. at 263 n.9).

17 In Arizona, claims not previously presented to the state courts via either direct appeal  
 18 or collateral review are generally barred from federal review because an attempt to return to  
 19 state court to present them is futile unless the claims fit in a narrow category of claims for  
 20 which a successive petition is permitted. See Ariz.R.Crim.P. 32.1(d)-(h), 32.2(a) (precluding  
 21 claims not raised on appeal or in prior petitions for post-conviction relief), 32.4(a) (time bar),  
 22 32.9(c) (petition for review must be filed within thirty days of trial court's decision). Arizona  
 23 courts have consistently applied Arizona's procedural rules to bar further review of claims  
 24 that were not raised on direct appeal or in prior Rule 32 post-conviction proceedings. See,  
 25 e.g., Stewart, 536 U.S. at 860 (determinations made under Arizona's procedural default rule  
 26 are "independent" of federal law); Smith v. Stewart, 241 F.3d 1191, 1195 n.2 (9<sup>th</sup> Cir. 2001)  
 27 ("We have held that Arizona's procedural default rule is regularly followed ["adequate"] in  
 28 several cases.") (citations omitted), reversed on other grounds, Stewart v. Smith, 536 U.S.



1 856 (2002); see also Ortiz v. Stewart, 149 F.3d 923, 931-32 (rejecting argument that Arizona  
2 courts have not “strictly or regularly followed” Rule 32 of the Arizona Rules of Criminal  
3 Procedure); State v. Mata, 185 Ariz. 319, 334-36, 916 P.2d 1035, 1050-52 (Ariz. 1996)  
4 (waiver and preclusion rules strictly applied in post-conviction proceedings).

5 The federal court will not consider the merits of a procedurally defaulted claim unless  
6 a petitioner can demonstrate that a miscarriage of justice would result, or establish cause for  
7 his noncompliance and actual prejudice. See Schlup v. Delo, 513 U.S. 298, 321 (1995);  
8 Coleman, 501 U.S. at 750-51; Murray, 477 U.S. at 495-96. Pursuant to the “cause and  
9 prejudice” test, a petitioner must point to some external cause that prevented him from  
10 following the procedural rules of the state court and fairly presenting his claim. “A showing  
11 of cause must ordinarily turn on whether the prisoner can show that some objective factor  
12 external to the defense impeded [the prisoner’s] efforts to comply with the State’s procedural  
13 rule. Thus, cause is an external impediment such as government interference or reasonable  
14 unavailability of a claim’s factual basis.” Robinson v. Ignacio, 360 F.3d 1044, 1052 (9<sup>th</sup> Cir.  
15 2004) (citations and internal quotations omitted). Ignorance of the State’s procedural rules  
16 or other forms of general inadvertence or lack of legal training and a petitioner’s mental  
17 condition do not constitute legally cognizable “cause” for a petitioner’s failure to fairly  
18 present his claim. Regarding the “miscarriage of justice,” the Supreme Court has made clear  
19 that a fundamental miscarriage of justice exists when a Constitutional violation has resulted  
20 in the conviction of one who is actually innocent. See Murray, 477 U.S. at 495-96.

21 The Court finds that Petitioner’s claims are procedurally defaulted. Petitioner was  
22 sentenced on September 9, 2010, and he filed a timely notice of PCR on November 26, 2010.  
23 (Exhs. K, L, M, S.) The trial court assigned Petitioner PCR counsel and, after reviewing the  
24 record, PCR counsel filed a notice alerting the court that there were no viable issues to raise  
25 in a PCR petition. (Exhs. T, U.) Petitioner subsequently filed a *pro per* PCR petition. (Exh.  
26 W.)

27 In his PCR petition, Petitioner checked the boxes on the form for several general  
28 grounds for relief, but did not develop any of them. (Exh. W at 1-2.) Moreover, to the extent

1 there is any mention of the present habeas claims, it is in passing in “Attachment A” under  
2 the heading “Statement of Facts and Grounds,” where Petitioner states that: (a) the trial court  
3 should have dismissed the case “when prosecution filed untimely indictment and  
4 information;” (b) prosecutorial misconduct occurred “when intentionally delaying filing of  
5 indictment and information to gain advantage to unlawfully induced [sic] a plea of guilty;”  
6 (c) denial of due process when prosecution filed “incomplete indictment or information  
7 without the correct signature of the grand jury foreperson;” (d) the trial court lacked subject  
8 matter jurisdiction; and (e) IAC of counsel for “failure to conduct any pretrial discovery  
9 investigation and file a timely motion to challenge grand jury indictment.” (Id. at 5-6.)

10 The trial court summarily dismissed Petitioner’s PCR petition “[f]or the reasons stated  
11 in the Response filed by the State of Arizona.” (Exh. Z.) Those reasons were: (1) the PCR  
12 did not state a colorable claim for relief that is not specifically precluded by express waiver  
13 in the plea agreements in each case; (2) Petitioner failed to articulate claims supported by  
14 legal and record citations as required by Rule 32.5, Ariz.R.Crim.P.; and (3) Petitioner’s  
15 “memorandum of points and authorities is too vague and general to allow a response.” (Exh.  
16 X at 9.) Thus, Petitioner failed to adequately articulate and develop his claims as required  
17 by state law.

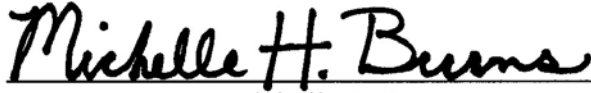
18 Accordingly, Petitioner failed to fairly present his claims to the state court by  
19 describing the operative facts and federal legal theory upon which his claims are based.  
20 Indeed, Petitioner failed to make the federal basis of any claim explicit either by citing  
21 specific provisions of federal law, or by citing cases that explicitly analyzed the same federal  
22 constitutional claims. See Picard, 404 U.S. at 275-78 (“[W]e have required a state prisoner  
23 to present the state courts with the same claim he urges upon the federal courts.”). And,  
24 Petitioner’s general appeal to a constitutional guarantee, such as due process, is insufficient  
25 to achieve fair presentation. See Castillo, 399 F.3d at 1003 (“Exhaustion demands more than  
26 drive-by citation, detached from any articulation of an underlying federal legal theory.”).  
27 Moreover, it would be futile for Petitioner to return to the state court to exhaust his claims  
28 and, as such, they are procedurally defaulted. See Ariz. R. Crim. P. 32.2 and 32.4.



1           **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and leave  
2 to proceed *in forma pauperis* on appeal be **DENIED** because the dismissal of the Petition is  
3 justified by a plain procedural bar and jurists of reason would not find the procedural ruling  
4 debatable.

5           This recommendation is not an order that is immediately appealable to the Ninth  
6 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of  
7 Appellate Procedure, should not be filed until entry of the district court's judgment. The  
8 parties shall have fourteen days from the date of service of a copy of this recommendation  
9 within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1);  
10 Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen  
11 days within which to file a response to the objections. Failure timely to file objections to the  
12 Magistrate Judge's Report and Recommendation may result in the acceptance of the Report  
13 and Recommendation by the district court without further review. See United States v.  
14 Reyna-Tapia, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003). Failure timely to file objections to any  
15 factual determinations of the Magistrate Judge will be considered a waiver of a party's right  
16 to appellate review of the findings of fact in an order or judgment entered pursuant to the  
17 Magistrate Judge's recommendation. See Rule 72, Federal Rules of Civil Procedure.

18           DATED this 17th day of November, 2014.

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21           Michelle H. Burns  
22           United States Magistrate Judge  
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